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DBS Vickers (Hong Kong) Ltd v Wan Muhamad Hasni bin Wan Sulaiman

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D4–29–914 OF 2003
ABDUL WAHAB JC
B 13 DECEMBER 2004

Bankruptcy — Act of bankruptcy — Application to set aside bankruptcy notice and adjudicating and receiving orders — Whether bankruptcy notice void as interest payable was indefinite and ambiguous

C

Bankruptcy — Act of bankruptcy — Application to set aside bankruptcy notice and adjudicating and receiving orders — Whether bankruptcy notice void for requiring payment of money outside jurisdiction

D *Bankruptcy — Act of bankruptcy — Application to set aside bankruptcy notice and adjudicating and receiving orders — Whether judgment given in matter agreed by parties to be litigated in Hong Kong and only Hong Kong law is applicable judgment under s 3(1)(i) of the Bankruptcy Act 1967*

This was an appeal against the senior assistant registrar's decision dismissing the judgment debtor's (JD) application to set aside the bankruptcy notice (BN) E and granting the receiving and adjudication orders on the grounds: (i) the BN was void because it required payment of money outside jurisdiction. The judgment creditor's (JC) address was described in the BN as 18th Floor, Man Yee Building, 68 Des Voeux Road, Central, Hong Kong. This means the JD was required to effect payment to that address; (ii) the sum demanded in the BN for payment was incapable of precise quantification because the demand for F interest payable was indefinite and ambiguous and hence void for uncertainty; and (iii) the judgment relied on by the JC was not a judgment under s 3(1)(i) of the Bankruptcy Act 1967. It was argued that the High Court here was not competent to render judgment on a matter, which the parties have agreed to be litigated in Hong Kong, and that only Hong Kong law is to be applicable between them.

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Held, dismissing the appeal with costs:

(1) Order 45 r 2(1) of the Rules of the High Court 1980 provides that where any person is directed by any judgment order or award to pay money to or H for the credit of a person who is resident outside the scheduled territories, he must unless the controller had given permission for the payment under the Exchange Control Act 1953, unconditionally or upon condition pay the money into court. There was no merit in the argument that the JD could not pay because the JC had not provided an address within the jurisdiction for him to pay (see paras 8 and 9).

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(2) The amount in the BN in this case had been quantified until 6 March 2003 and the JD knew the exact amount due under the BN (see para 13).

(3) The issue of forum convenience of the case had been rendered *res judicata*. The jurisdictional issue was not raised by counsel at the trial. The JC had obtained judgment against the JD and unless the judgment had been set aside, the court will not inquire into its validity any further unless there is evidence of fraud, collusion or miscarriage of justice. As the jurisdictional issue was not raised at the trial and none of those circumstances of fraud, etc had also been raised, the JC's argument was held without merits (see para 18).

[**Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan penolong kanan pendaftar menolak permohonan penghutang penghakiman (JD) untuk mengetepikan notis kebankrapan (BN) dan membenarkan perintah-perintah penerimaan dan pengadilan atas alasan-alasan: (i) BN tidak sah kerana ia menghendaki bayaran wang di luar bidang kuasa. Alamat pemiutang penghakiman (JC) disebutkan dalam BN sebagai Tingkat 18, Bangunan Man Yee, 68 Des Voeux Road, Central, Hong Kong. Ini bermaksud JD dikehendaki membuat bayaran ke alamat tersebut; (ii) jumlah yang dituntut dalam BN untuk pembayaran tersebut tidak dapat ditentukan jumlah tepatnya kerana tuntutan untuk faedah yang perlu dibayar tidak tetap dan tidak jelas dan oleh itu tidak sah kerana ketidaktepatan; dan (iii) penghakiman yang digunakan oleh JC bukan penghakiman di bawah s 3(1)(i) Akta Kebankrapan 1967. Ia dihujahkan bahawa Mahkamah Tinggi di sini tidak kompeten untuk membuat penghakiman berhubung perkara tersebut, yang mana pihak-pihak telah bersetuju untuk dilitigasi di Hong Kong, dan hanya undang-undang Hong Kong yang terpakai ke atas mereka.

Diputuskan, menolak rayuan dengan kos:

(1) Perintah 45 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan bahawa sesiapa yang diarahkan oleh apa-apa perintah penghakiman atau award untuk membayar kepada atau untuk mengkredit kepada seseorang yang menetap di luar wilayah yang dijadualkan, beliau hendaklah kecuali pengawal telah memberikan kebenaran untuk pembayaran yang di bawah Akta Kawalan Penukaran 1953, tanpa atau dengan syarat membayar kemahkamah. Tiada merit dalam hujah bahawa JD tidak dapat membuat pembayaran kerana JC tidak memberikan alamat dalam bidang kuasa untuk beliau membuat pembayaran tersebut (lihat perenggan-perenggan 8 dan 9).

(2) Jumlah dalam BN dalam kes ini telah dikira sehingga 6 Mac 2003 danJD mengetahui jumlah tepat seperti dinyatakan dalam BN (lihat perenggan 13).

(3) Persoalan tentang forum convenience kes dianggap *res judicata*. Persoalan tentang bidang kuasa tidak ditimbulkan oleh peguam semasa perbicaraan.

JC telah memperoleh penhakiman terhadap JD dan kecuali penghakiman tersebut diketepikan, mahkamah tidak perlu menyoal tentang kesahannya dengan lebih lanjut kecuali terdapat keterangan tentang fraud, pakatan sulit atau kesilapan mahkamah. Memandangkan persoalan tentang bidang kuasa tidak ditimbulkan semasa perbicaraan dan tiada keadaan fraud dan lain-lain ditimbulkan, hujah JC diputuskan tanpa mempunyai merit (lihat perenggan 18).]

Notes

For case on application to set aside bankruptcy notice and adjudicating and receiving orders, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1982.

Cases referred to

A Debtor, Re [1911] 1 KB 5 (refd)
Ghazali Mat Noor v Southern Bank Bhd [1989] 2 MLJ 142 (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd) 1988
Martin, Re [1969] FLR 13 (refd)
Sebastian, Re; ex p Metroplex Leasing & Credit Corp Sdn Bhd [1990] 3 MLJ 248 (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)
Walter Su, Re; ex p United Malaysian Banking Corp Bhd [1987] 1 MLJ 44 (refd)

Legislation referred to

Rules of the High Court 1980 O 45 r 2(1)
Bankruptcy Act 1967 s 3(1)(i)
Exchange Control Act 1953

NC Yoong (SC Wong with him) (Yoong & Partners) for the judgment creditor.
TS Marbeck (TS Marbeck & Co) (CK Goh with him) (Goh & Tan) for the judgment debtor.

Abdul Wahab JC:

[1] Enclosure 15 is an appeal against the senior assistant registrar's decision dismissing the judgment debtor's (JD) application to set aside the bankruptcy notice (BN) while encl 18 is against the receiving order and adjudication order given by the senior assistant registrar.

[2] Counsel for JD submitted that the BN is void because it requires payment of money outside jurisdiction. The judgment creditor's (JC) address is described in the BN as 18th Floor, Man Yee Building, 68 Des Voeux Road, Central, Hong Kong. This means the JD is required to effect payment to that address.

[3] He contended the law is, that a JC cannot require payment by the JD out of the jurisdiction. It would be absurd if the JD were required to locate the foreign JC and pay off the debt there, in foreign currency. It would be more practicable for the JC to be where the JD is. He cited *Re A Debtor* [1911] 1 KB 5, where a French firm obtained a final judgment against the JD who resided in England. A BN was served upon him requiring him to pay the amount due at an address in Paris. The court held that the notice was bad for it required the JD to pay the judgment debt without the jurisdiction of the court.

[4] He further submitted that *Re A Debtor* was followed by the Australian Federal Court in *Re Martin* [1969] FLR13, where a foreign creditor having obtained a judgment which obliges the debtor to pay the foreign creditor in Australia, the notice should state the address of the creditor at a place in Australia.

[5] Counsel for JC in reply submitted that there is no requirement for the Bankruptcy Notice to cite an address within Malaysia. The law, founded on Bankruptcy Act 1967 and the Bankruptcy Rules 1969 does not require the BN to request for payment to be made by the JD to JC at an address within jurisdiction.

[6] Referring to *Re A Debtor* he said that it is a 93 year-old English case. Its applicability in this day and age is doubtful. This is especially so since there had been no clear decision or affirmation on point in Malaysia or in England. The case was decided on a technicality, which may have mattered 93 years ago but does not apply now, what with electronic transmissions and communications and vast development in transportation. I am in agreement with the counsel for the plaintiff on this point.

[7] It is true that the JC did not provide an address within the jurisdiction for JD to pay the amount in the bankruptcy notice. The JD should in accordance with the clear words of the BN compound or secure the sum to the satisfaction of the court.

[8] Order 45 r 2(1) of the Rules of High Court provides that where any person is directed by any judgment order or award to pay money to or for the credit of a person who is resident outside the scheduled territories, he must unless the controller had given permission for the payment under the Exchange Control Act 1953, unconditionally or upon condition pay the money into court.

[9] I find that in compliance with the BN which had been served on him and to avoid committing an act of bankruptcy JD should pay into court. There is no merit in the argument that the JD could not pay because the JC had not provided an address within the jurisdiction for him to pay if that was his intention. The BN gave JD notice to pay to the JC the equivalent sum of RM11,983,330.02 under the final judgment obtained against him or he *must* secure or compound to JC's satisfaction or alternatively to the satisfaction of

the court unless he has a counterclaim, set off or cross demand against the JC. As the JC had not provided an address within the jurisdiction, JD has the alternative means of paying the amount into the Bankruptcy Court which issued the BN. This must be done by the JC to avoid committing an act of bankruptcy. Order 45 r 2(1) which provides for payment into court when the judgment order etc is for the credit of the JC who is resident outside Malaysia could also be of assistance in our case. The notice in the BN itself and O 45 r 2(1) had provided the JD with the alternative means of satisfying the amount due under the judgment without much effort.

[10] Counsel for JD next submitted that the sum demanded in the BN for payment is incapable of precise quantification because the demand for interest payable is indefinite and ambiguous and hence void for uncertainty. This has much to do with the words 'Kos Dana' or cost of funds in the judgment on which the BN is based. It can only mean an uncertain fluctuating amount in relation to the computation of a judgment sum that is due. It is inexact, uncertain and incapable of being quantified. In *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263, the Supreme Court held that demands for unspecified sums in the BN is not in accordance with the terms of the judgment. The BN cannot be deemed to fall within s 3(1) of the Bankruptcy Act. Non-compliance with the terms of the judgment renders the BN invalid and failure to comply with such a notice is not an act of bankruptcy. A CP founded on it must necessarily fail. He cited *Ghazali Mat Moor v Southern Bank Bhd*[1989] 2 MLJ 142, where the Supreme Court held that for a BN to be valid, it should state the exact amount due as at the date of the BN. The JD must know the exact amount he has to pay to avoid bankruptcy. He does not have to make any calculations or enquiries. Further he said in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, the words 'prescribed rate of interest' mentioned In the judgment was not defined. Therefore the Federal Court held that the default judgment included an element of contractual interest at a fluctuating rate. When such interest was to run depended upon the absolute discretion of the respondent. By reason of the uncertainty, the default judgment was a nullity.

[11] He conceded that the amount USD2,152,022.04 was capable of being quantified, but not the amount of USD1,001,485.86 as the interest cannot be said to be accurate because the cost of funds is unknown. Because it is incapable of being quantified in accordance with the terms of the judgment, it is incapable of being the subject of execution. The BN should accordingly be rendered bad and invalid.

[12] Counsel for the JC submitted that the argument that the judgment sum is incapable of being quantified because 'Kos Dana' or cost of funds remains unknown is unfounded. The facts in this case are different from that of *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 . In that case it was quantifiable after the issuance of the BN. In our case, it was before the issuance of the BN.

The method of calculation is exactly according to the terms of the summary judgment dated 17 November 2000. Further he said the case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance* [1996] 1 MLJ 30 does not apply as it does not deal with the validity of a BN. It was on the setting aside of an irregular judgment in default.

[13] I find that the BN issued in our case is different from that in *Ghazali Mat Noor v Southern Bank Bhd & Ors*. There the Federal Court held that for a BN to be valid it should state the exact amount due as at the date of the bankruptcy. As the rate of interest in the BN was not quantified but to run till date of realization the court held the BN was bad. The amount in the BN in our case had been quantified until 6 March 2003 and the JD knew the exact amount due under the BN, this submission is also unfounded and rejected.

[14] Counsel for JD also contended that the judgment relied on by the JC is not a judgment under s 3(1)(i) of the Bankruptcy Act 1967. This is because the High Court here was not competent to render judgment on a matter, which the parties have agreed to be litigated in Hong Kong, and that only Hong Kong law is to be applicable between them. Since the law applicable is Hong Kong law, by explicit consent of both parties, the Malaysian courts are excluded from exercising jurisdiction in this matter. A court of bankruptcy has the jurisdiction and is independently entitled to enquire into the validity of a judgment or purposes of making appropriate orders in bankruptcy. He cited *Re Sebastian, ex p Metroptex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248, where VC George held that the Court of Bankruptcy has the power, at the instance of the debtor, to go behind the judgment and to inquire into the validity of the debt. This is regardless of the fact that the debtor, as in the present case, has previously applied in the action to set aside the judgment and his application has been refused and affirmed on appeal. Since the judgment in the instant case is jurisdictionally defective, it is rendered *void ab initio*.

[15] Counsel for the JC contended that the appellant is estopped by the principle of *res judicata* from reopening and relitigating the issue of the Malaysian courts' jurisdiction. The court adjudicated upon this issue after hearing full arguments, once before the SAR, and the second time before the judge in chambers on 20 April 2000. The SAR's decision that the Malaysian courts have jurisdiction to hear the matter and that the forum convenience is in Malaysia was upheld. The JD never appealed to the Court of Appeal against this decision. Consequently, the decision becomes binding on the parties and the appellant cannot reopen and relitigate the issue in the present proceedings in the Bankruptcy Court since it was *res judicata*.

[16] On going behind the judgment, counsel referred to *Re Walter Su, ex p United Malaysian Banking Corp Bhd* [1987] 1 MLJ 44 where it was held that: '… the Court of Bankruptcy will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that a judgment

had been obtained by fraud or collusion, or that there has been some miscarriage of justice.' The JD had not raised the issues of fraud collusion or miscarriage of justice here.

[17] He further added that in *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* referred to by the JD does not apply here because it is restricted to a situation where judgment in default has been entered and the consideration for the judgment debt was questionable. In the present case, the JD was at all times represented by counsel throughout the proceedings and all the issues raised by the appellant were fully argued and heard before being adjudicated upon.

[18] I am in agreement with the submission of the JC's counsel that the issue of forum convenience of the case had been rendered *res judicata*. The jurisdictional issue was not raised by counsel at the trial. JC had obtained judgment against JD and unless the judgment had been set aside, the court will not inquire into its validity any further. The case of *Re Walter Su, ex p Malayan Banking Corp* is one of those many cases where the courts had held so unless there is evidence of fraud, collusion or miscarriage of justice. As the jurisdictional issue was not raised at the trial and non of those circumstances of fraud etc had also been raised, the JC's argument is also without merits.

[19] As the BN is valid it necessarily follows that the creditor's petition encl 7 had been correctly issued. The learned SAR was right in granting the adjudication order and receiving order.

[20] For those reasons aforesaid I dismissed both encls 15 and 18 with costs.

Appeal dismissed with costs.

Reported by AG Kalidas